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FORTHE SOUTHERN DISTRICT OF OHIO  
EASTERNDIVISION

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NICOLEA.SHERROD, )  
Individually and on behalf of a Class of )  
Similarly Situated Consumers, )  
Plaintiff, ) CASE NO. 2:13-cv-00036-JLG-TPK  
v. ) (Judge James L. Graham)  
ENIGMASOFTWARE GROUP USA, ) (Magistrate Judge Terence P. Kemp)  
LLC, )  
Defendant. )  
)

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**MOTION FOR SUMMARY JUDGMENT BY DEFENDANT ENIGMASOFT TWARE GROUP USA, LLC WITH MEMORANDUM IN SUPPORT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, defendant Enigma Software Group USA, LLC ("Enigma") hereby moves the Court to enter a summary judgment in its favor on all claims in the Class Action Complaint ("Complaint") that plaintiff Nicole A. Sherrod ("plaintiff") has brought against Enigma in this action.

Plaintiff asserts that Enigma charged her credit card, without authorization, for the renewal of a software subscription which she had obtained from Enigma. Her allegations, however, are disproved by Enigma's business records. Those records unequivocally demonstrate that plaintiff purchased two software subscriptions from Enigma at two separate times for two different computers using two different credit cards, but only cancelled one of those subscriptions and allowed the other to renew under the terms of the applicable license agreement.

The records demonstrate that Enigma's subscription management vendor honored plaintiff's request to cancel the one subscription, and neither renewed that subscription nor charged plaintiff for a renewal of that subscription. Enigma's subscription management vendor only renewed the

subscription for which plaintiff did not request cancellation, and only charged plaintiff for that renewal, again in accordance with the terms of the license agreement. Indeed, the record evidence reflects that Enigma and its subscription management vendor (1) acted in complete compliance with the applicable license agreement to verify the purchase and use of plaintiff's software subscriptions, and (2) made no representation to plaintiff that did not accurately reflect the relationship between the parties.

In sum, plaintiff received the goods and services for which she paid and cannot maintain a cause of action against Enigma based on her own confusion of the number of subscriptions that she purchased. Accordingly, and for the reasons set forth in the memorandum of points and authorities and declarations filed contemporaneously herewith, there is no dispute of material fact, and the Court should grant this motion and enter judgment in Enigma's favor as to each of plaintiff's claims in the Complaint.

WHEREFORE, defendant Enigma Software Group USA, LLC respectfully requests that the Court (1) grant this motion; (2) enter summary judgment in favor of Enigma and against plaintiff as to each of the claims in the Complaint; and (3) grant all other relief it deems just and necessary.

Respectfully submitted,  
ENIGMASOFTWAREGROUPUSA,LLC,  
By its attorneys,  
s/MarkA.VanderLaan

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## MEMORANDUM

Defendant Enigma Software Group USA, LLC (“Enigma”) submits the following memorandum of points and authorities in support of its Motion for Summary Judgment.

### 1. Introduction

Plaintiff Nicole A. Sherrod (“plaintiff”) asserts that Enigma charged her credit card, without authorization, for the renewal of a software subscription which she had obtained from Enigma. Her allegations, however, are disproved by Enigma’s business records. Those records unequivocally demonstrate that plaintiff purchased two software subscriptions from Enigma at two separate times for two different computers using two different credit cards, but only cancelled one of those subscriptions and allowed the other to renew under the terms of the applicable license agreement. The records demonstrate that Enigma’s subscription management vendor honored plaintiff’s request to cancel the one subscription, and neither renewed that subscription nor charged plaintiff for a renewal of that subscription. Enigma’s subscription management vendor only renewed the subscription for which plaintiff did not request cancellation, and only charged plaintiff for that renewal, again in accordance with the terms of the license agreement. Indeed, the record evidence reflects that Enigma and its subscription management vendor (1) acted in complete compliance with the applicable license agreement governing the purchase and use of plaintiff’s software subscriptions, and (2) made no representations to plaintiff that did not accurately reflect the relationship between the parties.

In sum, plaintiff received the goods and services for which she paid and cannot maintain a cause of action against Enigma based on her own negligence. She purchased accordingly, and for the reasons set forth below, there is no dispute of material

fact, and the Court should grant Enigma's Motion and enter judgment in its favor as to each of plaintiff's claims in the Complaint.

## 2. Undisputed Facts

### (a) Purchasing Enigma Software Subscriptions

Enigma produces a computer software program called SpyHunter, which detects and removes viruses and malware from personal computers. *See Declaration of Alessandro Malaspina ("Malaspina Decl.") at ¶4.* Enigma also produces a computer software program called RegHunter, which cleans personal computer registries. *See id. at ¶5.* When a customer purchases the SpyHunter program from Enigma through its website, the customer can choose to bundle that purchase with a purchase of the RegHunter program. *See id. at ¶6 & Ex. B.*

When a customer purchases and installs the SpyHunter program, separately or in a bundle with the RegHunter program, the customer agrees to the terms of the SpyHunter End User License Agreement ("SpyHunter EULA"). *See Malaspina Decl. at ¶7 & Ex. A.* The SpyHunter EULA provides that the customer "may install and use the software on your compatible computer, up to the Permitted Number of computers." *See Malaspina Decl., Ex. A at p. 2.* Unless a customer has a specially negotiated license, the EULA sets the Permitted Number at one computer. *See id.* The SpyHunter EULA also provides, under a heading reading "4. RENEWALS," that "[w]hen you purchase SpyHunter, your account will be configured for six month semi-annual automatic billing." *Id. at p. 4* (capitalization in original). Under the heading, the SpyHunter EULA provides for cancellation of the automatic renewal:

If you choose to cancel the automatic billing option, you can accomplish this by either: (a) opening a ticket with technical support (on the following URL: <http://www.enigmasoftware.com/support/>) and request to opt-out of the automatic billing option, (b) contact our payment processor Eseller at e.netat1-800-999-2734 (for international callers 1-719-576-0123), (c) or email Esellerate.netat

shopper@esellerate.net. If you cancel automatic billing, we will not bill you for continued service when your account expires.

*Id.*<sup>1</sup> Finally, the Renewals provision of the SpyHunter remains on automatic billing, your account will automatically renew at the end of your subscription and your credit card will be billed automatically. It provides that it is governed by the laws of the State of New York. *See id.* at p. 7.

The SpyHunter EULA is available through a link on the webpage, which link is styled “End User License Agreement” and is located above the “Proceed>>” button that a customer must click to complete their purchase. The SpyHunter–Purchase will automatically renew after six months and every six months thereafter. *See id.* at ¶8&Ex.B. The SpyHunter–Purchase webpage also notifies the customer that they will receive e-mail allowing them to opt out of the automatic renewal process. *See id.*

Enigma uses a third-party vendor, Digital River, Inc. (“Digital River”), to perform the customer billing and account renewal and cancellation functions in connection with customer purchases of software subscriptions from Enigma. *See Malaspina Decl.* at ¶19; *see also* Declaration of Thomas Beidle (“Beidle Decl.”) at ¶3. Among the functions that it provides to Enigma, Digital River notifies customers of upcoming subscription renewals, processes customer

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<sup>1</sup> Asset forth in the SpyHunter EULA, Esellerate.net Malaspina Decl., Ex. A at p. 1.

payments for subscription purchases and renewals, and processes customer subscription cancellations. See Malaspina Decl. at ¶19; Beidle Decl. at ¶3.

(b) Plaintiff Purchased Two Separate Software Subscriptions At Two Separate Times For Two Different Computers Using Two Different Credit Cards

On April 10, 2012, from a computer using an IP Address ending in the digits 160, plaintiff ordered a six-month subscription of Enigma's SpyHunter and RegHunter software programs (the "First Subscription"). See Malaspina Decl. at ¶9; Beidle Decl. at ¶4. Plaintiff used a MasterCard credit card ending in the digit 6817 to pay the \$69.98 price of the First Subscription. See Beidle Decl. at ¶6 & Ex. A. Asset forth above, (a) the SpyHunter EULA was available to plaintiff through a link on the SpyHunter "End User License Agreement" and is located above the "Proceed>>" button which plaintiff had clicked to complete the purchase of the First Subscription. Plaintiff was notified that the First Subscription would automatically renew after six months and every six months thereafter, and (c) the SpyHunter that she would receive e-mail allowing her to opt out of the automatic renewal process for her First Subscription. See Malaspina Decl. at ¶10 & Ex. B. Plaintiff received an invoice for the First Subscription with the order number for the subscription. See Beidle Decl. at ¶6 & Ex. A. On the same day as placing the April 10, 2012 order on the computer from which she had placed the order, plaintiff installed the SpyHunter software on the computer. See Malaspina Decl. at ¶11 & Ex. C. By installing the SpyHunter software, plaintiff agreed that the SpyHunter EULA would govern her First Subscription. See id. at ¶12 & Ex. A.

On April 15, 2012, from a different computer using the same IP Address ending in the digits 160, plaintiff ordered a second six-month subscription of Enigma's SpyHunter and

RegHuntersoftwareprograms(the“SecondSubscriptionon”).<sup>2</sup> *See* Malaspina Decl. at ¶13; Beidle Decl. at ¶7. Plaintiff used a different MasterCard credit card—ending in the digits 5709—to pay the \$69.98 price of the Second Subscription. *See* Beidle Decl. at ¶9 & Ex. B. Asset forth above, (a) the SpyHunter EULA was available to plaintiff through a link on the SpyHunter—Purchase webpage, which link is styled “End User License Agreement” and is located above the “Proceed>>” button which plaintiff had clicked to complete the purchase of the Second Subscription, (b) the SpyHunter—Purchase webpage also notified plaintiff that the Second Subscription would automatically renew after six months and every six months thereafter, and (c) the SpyHunter—Purchase webpage also notified plaintiff that she would receive e-mail allowing her to opt out of the automatic renewal process for her Second Subscription. *See* Malaspina Decl. at ¶14 & Ex. B. Plaintiff received an invoice for the Second Subscription with the order number for the subscription. *See* Beidle Decl. at ¶9 & Ex. B. On the same day as placing the April 15, 2012 order, plaintiff installed the SpyHunter software on the second computer from which she had placed the order, activated the software, and ran the software to scan the second computer. *See* Malaspina Decl. at ¶15 & Ex. C. By installing the SpyHunter software, plaintiff agreed that the SpyHunter EULA would govern her Second Subscription. *See id.* at ¶16 & Ex. A.

Digital River provided the customer billing and account renewal or cancellation functions to Enigma in connection with plaintiff’s First Subscription and Second Subscription. *See* Beidle Decl. at ¶10. Enigma never directly charged any credit card belonging to plaintiff. *See*

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<sup>2</sup> Enigma generates a unique Hardware ID with respect to every computer on which its software, including SpyHunter, is installed. *See* Malaspina Decl. at ¶17. The Hardware ID associated with the First Subscription is different from the Hardware ID associated with the Second Subscription. *See id.* at ¶18 & Ex. D. This reflects that Plaintiff made two different purchases of the SpyHunter software and installed those purchases on two different computers. *See id.* at ¶18. Plaintiff had no specially negotiated license from Enigma, *see id.* at ¶24, and thus, could only install each software package on a single computer, *see* Malaspina Decl., Ex. A at p.2.

MalaspinaDecl.at¶20.Rather,DigitalRivermad andprocessedany suchchargeson Enigma's behalf. *See id.* Therewerenocommunications—bytelephone,by e-mail,through SpyHunter's SpywareHelpdesk,orthroughEnigma's webpage—betweenEnigmaandplaintiff. *See id.* at¶23.

(c) PlaintiffRenewedHerFirstSubscription;Plaintiff CancelledHerSecond Subscription

OnOctober3,2012,DigitalRiverprovidedplaintif fnotificationthattheFirst Subscriptionwouldautomaticallyrenewinseven day s. *See BeidleDecl.at¶11.* DigitalRiver sentplaintifftheOctober3,2012notificationat here-mailaddressnicoleasherrod@yahoo.com, thee-mailaddressplaintiffprovidedwhensheorde redtheFirstSubscription. *See id.* at¶11& Ex.D.TheOctober3,2013notificationcontained theordernumberfortheFirstSubscription. *See id.* at¶11&Ex.C.TheOctober3,2012notification informedplaintiffthattherenewalof theFirstSubscription,whichplaintiffhadpurchas edonApril10,2012,wouldoccuronOctober 10,2012,ifshetooknoaction. *See id.* at¶12&Ex.C.TheOctober3,2012notification providedplaintiffalinktoreachDigitalRiverOn lineSupportandinformedherthattocancel theFirstSubscription,shecouldclickthatlink. *See id.* at¶13&Ex.C.Afterdoingso, and uponenteringhere-mailaddressandtheFirstSubs clickthe“Cancel”linksforthesoftwareprograms intheFirstSubscription. *See id.* at¶13& Ex.E.

PlaintifftooknoactioninconnectionwiththeOct ober3,2012notification. *See Beidle Decl.at¶14.* Indeed,plaintifftooknoactionto cancelherFirstSubscriptionprior toitsrenewal onOctober10,2012. *See id.* OnOctober10,2012,pursuanttotheEULA,Digital River renewedplaintiff'sFirstSubscriptionthroughApri 110,2013, andchargedherMasterCardcredit

cardendinginthedigits6817forthe\$69.98price ofthesix-monthrenewal.<sup>3</sup> *See id.* at ¶15& Ex.F; *see also* Malaspina Decl., Ex.D.

OnOctober8,2012,DigitalRiverprovidedplaintif fnotificationthattheSecond Subscriptionwouldautomaticallyrenewinseven day s. *See* Beidle Decl. at ¶16. DigitalRiver sentplaintifftheOctober8,2012notificationat here-mailaddressnicoleasherrod@yahoo.com, thee-mailaddressplaintiffprovidedwhensheorde redtheSecondSubscription. *See id.* at ¶16 &Ex.G. TheOctober8,2012notificationcontaine dtheordernumberfortheSecond Subscription. *See id.* at ¶16&Ex.C. TheOctober8,2012notification informedplaintiffthat therenewaloftheSecondSubscription,whichplain tiffhadpurchasedonApril15,2012,would occuronOctober15,2012,ifshetooknoaction. *See id.* at ¶17&Ex.C. TheOctober8,2012 notificationprovidedplaintiffalinktoreachDig italRiverOnlineSupportandinformedherthat tocanceltheSecondSubscription,shecouldclick thatlink. *See id.* at ¶18&Ex.C. Afterdoing so, anduponenteringhere-mailaddressandtheSe condSubscriptionordernumber,plaintiff couldthenclickthe“Cancel”linksforthesoftware epogramsintheSecondSubscription. *See id.* at ¶18&Ex.E.

AfterreceivingtheOctober8,2012notification,p laintiffclickedthelinktoaccess DigitalRiverOnlineSupport. *See* Beidle Decl. at ¶19. Afterdoingso, anduponenteringhere mailaddressandtheSecondSubscriptionordernumb er,plaintiffclickedthe“Cancel”linkfor theSpyHunterandRegHunterprogramsintheSecond Subscription. *See id.* OnOctober15, 2012, DigitalRiverprocessedthecancellationoft heSecondSubscriptionanddidnotrenewthe SecondSubscriptionorchargeplaintiff’sMasterCar dendinginthedigits5709(oranyother

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<sup>3</sup> Afterplaintifffilesuit,Enigmarequestedthat DigitalRivercanceltheautomaticrenewalofplain tiff’s FirstSubscriptionpriortoitsnextrenewal, and DigitalRiver,havingdone so,sentplaintiffnotice ofthe cancellation. *See* Malaspina Decl. at ¶21; Beidle Decl. at ¶21&Ex. s.D,F,&I.

creditcard)foranyrenewaloftheSecondSubscription. *See id.* at ¶19&Ex.H.OnOctober 15,2012,DigitalRiver sentplaintiffnotification ofthecancellationoftheSecondSubscription athere-mailaddressnicoleasherrod@yahoo.com,thethe-mailaddressthatplaintiffprovidedwhen sheorderedtheSecondSubscription. *See id.* at ¶20,Ex.G,&Ex.I.

### 3. Standard of Review

A court shall grant summary judgment if “there is no genuine dispute as to any material fact and the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P.56(a). The moving party bears “the initial responsibility of informing the Court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Tanner v. Calpin & Drysdale*, 24 F.3d 874, 878 (6th Cir. 1994) (moving party satisfies its summary judgment burden “by producing evidence showing the absence of a genuine issue of material fact or by showing that there is an absence of evidence to support the non-moving party’s case”). The non-moving party must then “come forward with ‘specific facts showing that there is a genuine issue for trial.’” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Firestone v. Galbreath*, 895 F. Supp. 917, 920 (S.D. Ohio 1995) (summary judgment is proper where “non-moving party lacks evidence to support an essential element of [her] claims”).

If the non-moving party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case...on which that party will bear the burden of proof at trial,” then Rule 56 “mandates the entry of summary judgment.” *Celotex*, 477 U.S. at 322; *see also* *Sparks v. Goodyear Atomic Corp.*, 773 F. Supp. 1043, 1045-46 (S.D. Ohio 1991) (“to secure the just, speedy and inexpensive determination of every action,” summary judgment for defendant must enter where evidence demonstrates that defendant “is entitled to judgment as a matter of

law"). In responding to a motion for summary judgment by the defendant, the plaintiff cannot rely on the "mere existence of a scintilla of evidence" in support of her claims, but rather must produce "evidence upon which a jury could reasonably find for the plaintiff." See *Sparks*, 773 F. Supp. at 1046; *Brown v. Ohio State Univ.*, 616 F. Supp. 2d 740, 748-49 (S.D. Ohio 2009) ("nonmoving party must present 'significant probative evidence'" in response to motion for summary judgment); *Barnhart v. Pickrel, Schaeffer & Ebeling Co., L.P.A.*, 12 F.3d 1382, 1389 (6th Cir. 1993) (district court has no "duty to search the entire record to establish that it is bereft of a genuine issue of material fact").

#### 4. Argument

##### (a) Plaintiff's Contract-Based Claims Fail Because Plaintiff Received The Products For Which She Bargained

Enigma's business records regarding plaintiff's subscriptions establish that plaintiff cannot provide the necessary evidence to support the contract-based claims and thus that judgments should enter for Enigma on those claims.

##### (i) Plaintiff Cannot Demonstrate That Enigma Breached Its Contract with Plaintiff

It is undisputed that plaintiff's relationship with Enigma—including her purchase and use of both software subscriptions—is governed by the EULA. Indeed, in the Complaint, plaintiff admits that she is bound by the EULA. See Compl. at ¶ 29. The EULA provides that it "will be governed by and construed in accordance with the substantive laws in force in the State of New York." See *Malaspina Decl.*, Ex. A at p. 7. Accordingly, plaintiff's breach of contract claim is governed by New York contract law, rather than that of Ohio. See *Tele-Save Merch. Co. v. Consumers Distrib. Co., Ltd.*, 814 F.2d 1120, 1122 (6th Cir. 1987) (noting Ohio law's strong adherence to contractual choice-of-law provisions).

To establish a breach of contract, a plaintiff must prove her own performance of the contract, the defendant's failure to perform, and resulting damages. *See Brual v. IBERIA*, 913 N.Y.S.2d 753, 754 (N.Y. App. Div. 2010). Where the defendant fulfilled its obligations under the contract, the defendant is entitled to judgment on a breach of contract claim as a matter of law. *See Katz v. Bd. of Managers*, 921 N.Y.S.2d 228, 229 (N.Y. App. Div. 2011) (granting summary judgment for defendant, where defendant fulfilled its obligations under contract); *Marks v. Smith*, 885 N.Y.S.2d 463, 465-66 (N.Y. App. Div. 2009) (same).<sup>4</sup>

Here, the record evidence demonstrates that Enigma and its vendor Digital River managed plaintiff's account in accordance with the terms of the EULA. Plaintiff purchased two subscriptions and that (1) each subscription would credit cards she provided at the time of purchase and that (2) the plaintiff would be charged for the renewal, unless plaintiff cancelled each subscription. *See Malaspina v. Digital River*, 885 N.Y.S.2d 463, 465-66 (N.Y. App. Div. 2009) (citing *Marks* and *Katz* for the proposition that a defendant is entitled to judgment on a breach of contract claim as a matter of law). The record establishes that plaintiff did not request cancellation of her First Subscription despite notice of its forthcoming renewal, and under the terms of the EULA, Digital River, on behalf of Enigma, was permitted to charge plaintiff for the renewal of the First Subscription. *See Beidle Decl. at ¶¶ 11-14 & Exs. C, D, & F*; *see also Malaspina Decl.*, Ex. A at p. 4. Thus, plaintiff cannot establish that Enigma or Digital River, acting on

<sup>4</sup> The law of Ohio requires a plaintiff pursuing a breach of contract claim to make the same showing, such that the outcome here would be the same even were the Court to apply Ohio law, rather than New York law, to plaintiff's breach of contract claim. *See Pavlovich v. Nat'l City Bank*, 435 F.3d 560, 564-65 (6th Cir. 2006) (summary judgment is warranted where evidence demonstrates that defendant's conduct comported with contract).

Enigma's behalf, "fail[ed] to cancel Plaintiff" ssu bscription upon request," or that Enigma or Digital River, acting on Enigma's behalf, "charg[ed] Plaintiff's credit card a new wafle without prior authorization and after Plaintiff canceled the Plaintiff's subscription." See Compl. at ¶31. Because plaintiff cannot establish Enigma failed to perform under the EULA, summary judgment should enter in Enigma's favor on plaintiff's breach of contract claim. See *Katz*, 921 N.Y.S.2d at 299; *Marks*, 885 N.Y.S.2d at 465-66.

(ii) Plaintiff Cannot Establish That the Doctrine of Promissory Estoppel Applies To This Matter

Under Ohio law, to establish a claim of promissory estoppel, a plaintiff "must demonstrate... (1)... a promise clear and unambiguous to whom the promise is made; (3) the reliance [was] by the party claiming estoppel [was] injured by the reliance." *Juergens v. Strang, Klubnik & Assoc., Inc.*, 96 Ohio App.3d 223, 231, 644 N.E.2d 1066 (8th Dist. 1994). The existence of a written, integrated contract between the parties bars a claim for promissory estoppel as to the subject matter for promissory estoppel last to the subject matter the contract covers. See *Mannov. St. Felicitas Elementary Sch.*, 161 Ohio App.3d 715, 2005-Ohio-3132, 831 N.E.2d 1071, ¶¶31-32 (8th Dist.); *Kashif v. Cent. State Univ.*, 133 Ohio App.3d 678, 683-84, 729 N.E.2d 787 (10th Dist. 1999).

Plaintiff's purchases of her First Subscription and her Second Subscription are each governed by the EULA, see *Malaspina Decl.* at ¶¶12, 16, and plaintiff has admitted the same, see Compl. at ¶29. The EULA provides, in part, that "[t]he EULA is effective at the time you downloaded the software will govern your use of it." See *Malaspina Decl.*, Ex. A at p.1. And the EULA specifically covers the subscription renewal process. See *id.* at p.4. Moreover, the EULA contains an integration clause. See *id.* at p.8 ("This is the entire agreement between [Enigma] and you relating to the Software and its terms and conditions, and it supersedes any prior representations,

discussions, undertakings, communications or advertising relating to the Software.”). Because plaintiff’s claim regarding the renewal of her subscription is governed by the EULA, and because the EULA is a written, integrated contract, plaintiff is barred from maintaining a promissory estoppel cause of action, and summary judgment for Enigma is warranted on that basis alone. *See Manno*, 161 Ohio App.3d 715, 2005-Ohio-3132, 831 N.E.2d 1071, at ¶¶31-32; *Kashif*, 133 Ohio App.3d at 683-84, 729 N.E.2d 787; *see also KenaProps., L.L.C. v. Merchs. Bank & Trust*, No. 1:04-CV-672, 2006 WL 1071874, at \*4 (S.D.Ohio Apr. 24, 2006) (granting summary judgment; written contract barred promisor from estoppel claim).

Further, plaintiff cannot establish that she was in reliance as a result of reasonable reliance on any promise from Enigma. Plaintiff alleges that Enigma had it cancelled and would not automatically renew the first subscription. Yet, Enigma made no such representations in communication with plaintiff whatsoever. *See* Malaspina Decl. at ¶23. Nordid Digital River, acting on Enigma’s behalf, made any representation to plaintiff prior to her filing suit that it had cancelled and would not automatically renew the first subscription.<sup>5</sup> *See* Beidle Decl. at ¶¶11-15. With respect to the second subscription, Digital River, acting on Enigma’s behalf, automatically renewed the second subscription, *see id.* at ¶¶16-19, such that its representation to plaintiff that it had done so, *see id.* at ¶20, was a result of reliance upon any promise and cannot maintain a claim for promissory estoppel against Enigma on that claim.

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<sup>5</sup> *See, supra, note 3.*

(b) Plaintiff's Misrepresentation Claims Fail Because Plaintiff Cannot Establish The Existence Of Any Misrepresentation

Plaintiff cannot provide evidence demonstrating the requisite elements of her misrepresentation-based claims, whether they sound in fraud or negligence, and thus, summary judgment on those claims is appropriate. *See Barnhart*, 12 F.3d at 1389; *Firestone*, 895 F.Supp. at 920.

(i) Because A Written Contract Governs the Subject Transaction, Plaintiff's Misrepresentation-Based Tort Claims Are Barred

Where a contract governs the relationship between the parties, the existence of the contract bars the parties from bringing tort-based causes of action against each other for claims arising out of the contract. *See Nichols v. Chi. Title Ins. Co.*, 107 Ohio App.3d 684, 696-97, 669 N.E.2d 323 (8th Dist. 1995) (“a cause of action [so unding in contract] cannot be classified as a tort action simply because the [plaintiff] used the term ‘fraudulently’ in her pleading”); *see also Pappa v. Ippolito*, 177 Ohio App.3d 625, 2008-Ohio-3976, 895 N.E.2d 610, ¶44 (granting summary judgment for defendant on plaintiffs’ fraud claim where contract between parties governed claim at issue). “Where the duty alleged is breached by the defendant is one that arises out of a contract, independent of any duty imposed by law, the cause of action is one of contract.” *Nichols*, 107 Ohio App.3d at 696-97, 669 N.E.2d 323; *see Pavlovich*, 435 F.3d at 569-70 (“Ohio law prevents the recovery of purely economic losses... where recovery of such damages is not based upon a tort duty independent of the representation in connection with the cancellation of automatic subscription renewals because the EULA sets forth the parties’ obligations in connection with the cancellation of those renewals. *See Malaspina Decl.*, Ex.A at p.4.

Further, according to the Complaint, plaintiff's allegations damages are solely economic in nature—namely, the purported charge for an alleged unauthorized renewal. *See Compl. ¶¶14, 32, 37, 43, 47.* Even if plaintiff could demonstrate that Enigma's and Digital River's records establish she cannot put forth any evidence of non-economic damages. Accordingly, the economic loss doctrine precludes plaintiff's tort-based misrepresentation claims as a matter of law. *See 425 Beecher, L.L.C. v. Unizan Bank, Nat'l Ass'n*, 186 Ohio App.3d 214, 2010-Ohio-412, 927 N.E.2d 46, ¶¶47-51 (10th Dist.).

Because plaintiff's misrepresentation-based tort claim aims, whether sounding in fraud or negligence, fails as a matter of law, judgments should enter for Enigma on those claims.

(ii) Plaintiff Cannot Demonstrate That Enigma Made Any False Representations To Her

Plaintiff cannot sustain her misrepresentation-based claims because she cannot demonstrate that Enigma made any false representations to her. <sup>6</sup> Plaintiff styles her third cause of action "Count Three: Fraud" and her fourth cause of action "Count Four: Misrepresentation." To the extent plaintiff alleges that Enigma made a fraudulent or intentional misrepresentation "concerning the cancellation, renewal and renewal charge for the software subscriptions she purchased," *see Compl. ¶¶39, 45*, the causes of action overlap. *See Hibbett v. City of Cincinnati*, 4 Ohio App.3d 128, 131, 446 N.E.2d 832 (1st Dist. 1982) (essential element to a claim for fraud is the alleged misrepresentation). To the extent plaintiff bases her fourth cause of action on Enigma's alleged "failure to exercise reasonable care or competence in obtaining and communicating information to Plaintiff concerning" her cancellation of the Second Subscription

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<sup>6</sup> In addition, plaintiff's allegations of fraud do not comport with the pleading requirements of the Federal Rules of Civil Procedure because they do not "state with particularity the circumstances" giving rise to the alleged fraud. Fed.R.Civ.P.9(b).

and renewal of the First Subscription, Enigma reads such an allegation, for the sake of argument only, as asserting a claim of negligent misrepresentation.

Regardless of whether plaintiff asserts her claims under a theory of fraud or negligence, plaintiff must prove a false representation to sustain either claim. *See Pappas*, 177 Ohio App.3d 625, 2008-Ohio-3976, 895 N.E.2d 610, at ¶40 (“[a] claim of common-law fraud requires proof of . . . a representation . . . made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred”); *Delman v. City of Cleveland Heights*, 41 Ohio St.3d 1, 4, 534 N.E.2d 835 (1989) (negligent misrepresentation requires showing that defendant “supplied[d] false information”). Where a plaintiff cannot demonstrate the falsity of the alleged misrepresentation, her claim for misrepresentation fails as a matter of law. *See Kelley v. Ruf*, 181 Ohio App.3d 534, 2009-Ohio-1215, 909 N.E.2d 714, ¶¶9-12 (9th Dist.); *Manno*, 161 Ohio App.3d 715, 2005-Ohio-3132, 831 N.E.2d 1071, at ¶¶34-35; *Shaw v. J. Pollock & Co.*, 82 Ohio App.3d 656, 662, 612 N.E.2d 1295 (9th Dist. 1992).

Here, Enigma’s and Digital River’s records establish that neither Enigma nor Digital River, acting on Enigma’s behalf, ever made any false representation to plaintiff. Enigma and Digital River never represented to plaintiff, prior to her filing suit, that they had cancelled her First Subscription as plaintiff had not requested cancellation of the First Subscription, and Enigma and Digital River never represented to plaintiff that they would not charge her for renewal of the First Subscription.<sup>7</sup> *See Malaspina Decl.*, Ex. D; *Beidle Decl.*, Exs. D, F, G, & H; *see also Beidle Decl.* at ¶¶11-15. Rather, plaintiff frequently represented that Digital River, on Enigma’s

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*See, supra*, note 3.

behalf, cancel her Second Subscription, which Digit al River *did* cancel and *did not* renew.<sup>8</sup> See Beidle Decl. at ¶¶16-20 & Exs. G-I. Moreover, Eni ma's records reflect no communications between it and plaintiff, either by telephone, bye -mail, through SpyHunter's Spyware Helpdesk, or through Enigma's webpage. *See* Malaspina Decl. at ¶23. Because there is no evidence that Enigma or Digital River, acting on Enigma's behalf, made any false representation to plaintiff, the Court should enter judgment in favor of Enigma on plaintiff's misrepresentation-based claims whether they sound in fraud or negligence.

(iii) Plaintiff Cannot Demonstrate Any Injury Because She Received Everything For Which She Paid

Enigma's and Digital River's records of plaintiff's transactions demonstrate that neither Enigma nor Digital River, acting on Enigma's behalf, ever charged plaintiff for any software which she had not agreed to purchase. Digital River made three charges to plaintiff's credit cards, namely: (1) the charge for plaintiff's original purchase of her Second Subscription; (2) the monthly renewal of the First Subscription, which is reflected in plaintiff's records; and (3) the charge for the six-month renewal of the First Subscription, which plaintiff had not cancelled. *See* Beidle Decl., Exs. A, B; Malaspina Decl., Ex. D. Plaintiff authorized each of these three charges during the purchase process and pursuant to the terms of the EULA. *See* Beidle Decl., Exs. A, B; Malaspina Decl., Ex. A at p. 4; *see also* Malaspina Decl. at ¶¶7-8, 10, 14 & Ex. B. Neither Enigma's nor Digital River's records reflect any other charges, let alone any unauthorized charges, to either of plaintiff's credit cards, *see* Malaspina Decl. at ¶20 & Ex. D; Beidle Decl. at ¶¶19, 21, and plaintiff cannot provide any evidence that plaintiff cannot establish any injury, her misrepresentation-based claims fail. *See Delman*, 41

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<sup>8</sup> In addition, there is no evidence that Enigma owed any duty to plaintiff beyond its duty under the EULA, which duty Enigma fully discharged.

OhioSt.3dat4,534N.E.2d835; *Pappas*,177OhioApp.3d625,2008-Ohio-3976,895N.E.2d 610,at¶40.

### 5. Conclusion

For the foregoing reasons, defendant Enigma Software Group USA, LLC respectfully requests that the Court (1) grant Enigma's Motion for Summary Judgment; (2) enter judgment in favor of Enigma and against plaintiff fastoeach of the claims in the Complaint; and (3) grant all other relief it deems just and necessary.

Respectfully submitted,

ENIGMA SOFTWARE GROUP USA, LLC,

By its attorneys,

s/Mark A. VanderLaan

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing has been duly served upon All Counsel of Record by the Court's EM/ECF Electronic Mail system this 18<sup>th</sup> day of June, 2013.

s/Mark A. VanderLaan  
Mark A. VanderLaan (Ohio Bar Number 0013297)